CGI

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June 30, 2008

Debbie O'Leary
Department of Administrative Services
State of Iowa
Hoover State Office Building
1305 E. Walnut Street
Des Moines, Iowa 50319

Dear Ms. O'Leary,

The purpose of this letter is to provide written comments on the proposed new Chapter 108, "Contractual Limitation of Vendor Liability Provisions," of the Iowa Administrative Code. Please find attached our specific response to the State of Iowa's Notice of Intended Action, dated June 4, 2008 ("Rules") regarding contractual limitation of liability.

CGI Technologies and Solutions Inc., formerly CGI-AMS Inc. and American Management Systems, Inc., ("CGI") has a long history of successful performance in support of the State of Iowa ("State" or "Iowa") under contracts that have included limitations of liability. These liability limits have allocated risk between the State and CGI consistent with industry norms. The trend in Iowa's procurements to increase a vendor's liability for performance have made it difficult for CGI, as well as other large or publicly held IT firms, to participate since this shift places risk on the vendor inordinate to their performance responsibilities and associated ability to secure appropriate insurance.

CGI has decided not to participate in certain State procurements due to the associated limitation of liability provisions, including the likelihood of being disqualified if exceptions are taken. Similarly, conversations with other vendors regarding the State have confirmed that they have either passed on procurements, or failed to negotiate a contract, due to the limitation of liability requirements and related provisions. By way of example, although fully qualified, CGI will not be bidding on a current Judicial Courts request for proposal for an Electronic Data Management System ("EDMS RFP") because of the limitation of liability requirements. As part of the procurement's question and answer process CGI requested reconsideration of the limits and the State declined. This is the Judicial Court's second attempt to award this work. CGI did not participate in the original EDMS RFP last year because of the limitation of liability, nor was the State able to conclude contract negotiations with the successful bidder. It is CGI's belief that a balanced liability provision would have encouraged the large IT firms to participate on the original EDMS RFP, greatly increasing the State's chance of reaching agreement on a contract, and avoiding the time and expense lost for the State's re-procurement.

To the extent that CGI and other large or publicly held IT firms have declined to participate on the State's initiatives, the State has also lost the option of benefiting from the solutions these firms have to offer. To the extent this issue tends to discourage, or preclude, participation by the larger, national or multi-national IT providers, the State's solution and provider options will be reduced or restricted to smaller vendors. This result reduces overall competition and can have the additional consequence that overall risk for the State is increased. The latter can occur since smaller firms will not have the resources or scale that may be required to deliver on the State's larger, more complex initiatives.

Offering limitation of liability provisions that promote open competition and allow all providers to participate will enable the State to select from more providers and solution options. This in turn will allow the State to reduce its overall risk and increase its return on investment—because it can evaluate and select from all interested and viable providers and solutions. This is particularly true given that a lack of liability limitation provisions will preclude participation by the larger more diverse IT providers, the subset of providers the State needs to reduce risk on its larger, more complex and risky initiatives.

Thank you for allowing us to provide written comments regarding the State's policy regarding limitation of liability. Please do not hesitate to contact me should you have any questions regarding these written comments.

Sincerely,

JDean

Jessie Dean
Director, Contracts Management
Office of General Counsel

CGI COMMENTS ON NOTICE OF INTENDED ACTION, ARC 6809b
RE: IOWA LIMITATION OF LIABILITY

CGI has reviewed the State of Iowa's proposed new Chapter 108, "Contractual Limitation of Vendor Liability Provisions," of the Iowa Administrative Code. This document sets forth our specific concerns with the text of Chapter 108.

- **Section 11-108.3:** It is unclear what rules apply when agencies procure on their own behalf, without the involvement of the Department of Administrative Services. Without including a provision covering this eventuality, is it assumed that limitation of liability in contracts procured by agencies directly are negotiated at the sole discretion of the agency, and such limits are enforceable under Iowa law?

- **Section 11-108.5(1):** Certain provisions of Section 11-108.5 present significant problems for CGI and, in our view, negate all of the protections that would be afforded to CGI by a limitation of liability provision that complies with our corporate legal frameworks. This Section of the Rules would require additional revisions prior to enactment in order for CGI to be permitted to bid on future opportunities in Iowa. The first proposed revision is to limit the overall cap to one (1) times the contract value.

    - Section 11-108.5(1)a: Like most other similarly situated corporations, CGI is willing to agree to unlimited liability for intentional torts and willful misconduct, including criminal acts, gross negligence and fraud. CGI is unable to agree to bad faith or unlawful acts as carve outs to the limitation of liability as they can be construed as contract breaches.

    - Section 11-108.5(1)b: CGI would accept a carve-out to the limitation of liability for claims related to death, personal injury, or damage to real or personal property to the extent caused by CGI's negligence.

    - Section 11-108.5(1)c: CGI would also accept a carve-out to the limitation of liability for third-party indemnification claims related to intellectual property infringement by CGI for its proprietary offerings or custom solutions developed entirely by CGI. All other claims and obligations (not already addressed by Sections 11-108.5(1)a, 11-108.5(1)b and 11-108.5(1)d) including, without limitation, indemnification for negligence or breach of an obligation, liquidated damages, and breach of an express representation or warranty would need to be subject to the limitation of liability. CGI also does not agree that performance bonds or insurance coverage would be excluded from the limits. Such exclusions from the limits would undermine the very protection CGI seeks in a limitation of liability provision.

    - Section 11-108.5(1)d: As stated in Section 11-108.5(1)b, CGI would accept unlimited liability for third-party indemnification claims for death, personal injury or property damage caused by its negligence or willful misconduct.

- **Section 11-108.5(2)**: This section would need to be modified because CGI requires a disclaimer of such damages, subject to certain carve-outs.

    - Section 11-108.5(2)a: This section would permit such damages if specifically set forth in the statement of work, scope of services or technical requirements. A contractor's limitation of liability is fundamental to entering into a contract; therefore, any changes to the rules for liability limits required for a particular transaction must be communicated in advance of proposal submission.

- Section 11-108.5(2)b: This section applies the same exclusions to indirect damages as those set forth in 11-508.5(1). CGI requires the industry standard disclaimer of indirect and consequential damages; provided, however, CGI would agree to accept claims of personal injury and property damage due to its negligence, CGI's indemnification obligation for intellectual property infringement, and intentional torts and willful misconduct, including criminal acts, gross negligence and fraud as carve-outs to the indirect disclaimer.

- Any rules promulgated by Iowa should clarify the State's position on whether a limitation of liability in vendor contracts is permissible under the Constitution of the State of Iowa. Otherwise, vendors cannot achieve certainty as to whether contractually negotiated provisions would provide them with the protection they bargained for in striking an economic deal. Given the prior versions of the proposed rules governing limitation of liability, the State's silence now leaves uncertainty about the constitutionality of these limits, therefore, CGI requests that the rules assert that a limitation of liability would be deemed to be constitutional.

CGI would accept the following limitation of liability language in a contract for professional services:

A. **Limitation of Liability.** If the State should become entitled to claim damages from Contractor for any reason (including without limitation, for breach of contract, breach of warranty, negligence or other tort claim), Contractor will be liable only for the amount of the State's actual direct damages, in the aggregate for all claims made with respect the Contract, for no more than the Contract Value. For purposes of this provision "Contract Value" means the aggregate total compensation paid by the State to the Contractor under the entire term of the Contract including all renewals and extensions.

B. **No Liability for Certain Damages**. In no event will Contractor be liable for any lost profits, loss of business, loss of data, loss of use, lost savings or other consequential, special, incidental, indirect, exemplary or punitive damages, even if it has been advised of the possibility of such damages.

C. **Exclusions from Limitation**. The foregoing limitations do not apply to:

(1) Contractor's intentional torts and willful misconduct, including criminal acts, gross negligence and fraud;

(2) claims related to death, personal injury, or damage to real or personal property to the extent caused by Contractor's negligence; and,

(3) intellectual property infringement by Contractor for its proprietary offerings or custom solutions licensed to the State.

ITAA

June 24, 2008

Director Mollie Anderson
Department of Administrative Services
State of Iowa
Hoover State Office Building
1305 East Walnut Street
Des Moines, Iowa 50319

Re: Notice of Intended Action on Chapter 108, “Contractual Limitation of Vendor Liability Provisions”

Dear Director Anderson:

As you requested, I write on behalf of the Information Technology Association of America to express our views regarding the Department’s Notice of Intended Action (NOIA) to adopt new Chapter 108, “Contractual Limitation of Vendor Liability Provisions,” in the Iowa Administrative Code.

In this letter, we will focus our comments primarily on the case for limitation of liability and other commercially-reasonable contract terms and conditions. In the latter portion of the letter, we will provide a brief assessment of the arguments made in a few courts and opinions against the use of limitation of liability provisions. We offer this information in the spirit of sharing industry perspective on the wide array of practices used at the federal and state government levels, as well as a possible benchmark against which you might assess the potential utility and effectiveness of the measures proposed in the NOIA.

In the public sector marketplace, significant acquisition reform initiatives have successfully occurred across the country to implement best practices of the commercial marketplace and which seek to capture the flexibility of the private marketplace to implement innovation. ITAA and its corporate members have been pleased to partake in several such initiatives, to contribute industry perspective and contracting expertise, and stand ready to work with the State of Iowa and the Department of Administrative Services (DAS) to reach a “win-win” scenario for the state and its vendor partners.

Companies providing goods and services to government understand why many states have placed a high priority on adopting standard contract terms and conditions that protect the government. The high profile and risk associated with major projects, such as IT initiatives, and the (at times) dire consequences accompanying project failures, have made it necessary to effectively manage the public interest in contracts for large procurements. In our view, however, reasonable protection through terms and conditions should not equate to complete risk avoidance. A relationship where one party bears all the risk is not one where, in our experience, the end result is satisfactory to either party. Nor is it a relationship that either party is likely to repeat when, as in the vendor's case, companies have fiduciary duties to their shareholders and others.

Specifically, there is evidence that inflexible terms and conditions developed without industry participation and support can negatively impact all parties to procurement. For example, such terms:

- Depart from commercial realities by imposing risks and costs on vendors that are disproportionate to any potential gain, and are often outside the risk-management parameters of the vendor. A responsible vendor with significant assets may simply be unable to accept certain terms and at the same time satisfy its statutory and regulatory obligations to manage risk and deliver profitable growth to its shareholders. This can lead to situations where the only vendors participating in key state procurements are those with inadequate expertise or insufficient assets to perform. Or, more accomplished vendors will respond to unbounded risk with higher prices.

- A procuring agency's insistence on adherence to inflexible terms often discourages otherwise competitive vendors from participating in procurements, thus depriving the public of the benefit of full competition. The process of completing public procurements also is complicated when the public agency starts with "out of market" terms and a lengthy period follows where established private firms seek to bring the terms into alignment with what is acceptable in the industry. Such delays serve no one's interests.

- Even when competition does proceed, it is a practical reality that commercially unreasonable terms and conditions require vendors to take measures to minimize potential risk to a company's viability. In deciding whether to pursue a major procurement opportunity, vendors are often faced with making a "bet the business" decision or responding to the government's RFP only after devising or purchasing very robust, costly protection against excessive risk exposure. Another outcome can be that more established firms elect to become lower tier subcontractors so that their exposure is reduced.

ITAA and its member companies support efforts in Iowa to avoid these adverse results and to improve procurement processes and outcomes for Iowa agencies and the citizens they serve. The following section provides a brief overview of the benefits the State could reap via a shift to more commercially reasonable terms and conditions.

Benefits of Commercial Terms and Conditions

There are alternatives to onerous terms and conditions that in the end do little to protect either party. ITAA recognizes that there are special needs and interests of the public purchaser that require recognition but ITAA advocates use of common, commercially acceptable terms and conditions, where appropriate. Our analysis indicates that the following benefits are among those most often cited for a move to prevailing industry standard terms and conditions.

Decreasing cost to drive best value for the customer. To the extent that vendors accept excessively onerous and risky terms and conditions, the risks are reflected in the bid price, preventing the government customer from getting the best value for its procurement dollar.

Potentially attracting more, and better qualified, vendors to bid on projects. In some recent cases, well known vendors have reached “no-bid” decisions when considering government opportunities (including opportunities in Iowa), not from an inability to provide the functionality desired but instead because of adverse reaction to the standard terms and conditions. By reducing or sharing risk in a balanced fashion, more companies will pursue business in Iowa -- thus bringing with them jobs and economic development. Moreover, qualified, local small and disadvantaged businesses may be more willing to pursue public sector work if they can secure balanced terms and conditions. Increasing the number of vendors will also yield better prices and more competitive choices for government departments and agencies. Where competition is more vigorous, public procurements will truly produce the best solution and value.

Expediting the procurement process. By eliminating, or curtailing, time-consuming negotiations over contract terms or at least reducing the number of terms subject to negotiation, Iowa and its vendor community can get on with the work of delivering products and services that meet the needs of its citizens and its employees.

Aligning the government with best practices in procurement. By moving to a more commercial posture on liability limitations, Iowa will position itself to achieve other improvements in its IT processes and practices and attain true “win-win” contracts between the government and its vendor partners. While good contract language is one way to limit the risk of project failure, sophisticated Iowa agency customers should look to continue best practices in contract scoping, developing customer specifications and requirements, and executing well on project management and administration to ensure project success.

Improving the customer-vendor relationship. An improved culture of trust and open communication between the customer and the contractor will also help create a successful outcome for Iowa government procurements. A public sector entity that assumes a less adversarial stance in contracting and negotiations, a stance which focuses on sharing risk and reward, and adopts a focus on partnership will benefit from a more open selection process, improved communication of ideas, and a shared interest in the success of the project. This can be achieved without sacrificing the important qualities of fairness, transparency and equity in the procurement process.

Lack of Liability Limitations Can Impact Procurement Success

The analysis presented above is supported by many of the findings contained in the the March 20, 2008 report, "Limitation on Liability in Iowa IT Contracting Report to Iowa Department of Administrative Services," developed at the behest of the State of Iowa DAS by the State Public Policy Group (SPPG).

The SPPG report gathered a wide array of opinion and research related to liability limitations in state government contracting. The passage on pages 13 – 14 is particularly relevant, as it highlights the ways Iowa's current policy on limitation of liability is viewed and weighed by those considering contracting opportunities with the State:

> "The unlimited liability provisions and the lack of specific information included in a RFP impact the state – Iowa or any state – in the following ways:
> • Vendors are less able to construct and propose a solution that best addresses the problem while mitigating the risks to the state.
> • The state will receive proposals based on incomplete information, i.e., the state's areas of risk for the project.
> • Proposals received will have cost proposals that are inflated by vendors' costs to cover any possible risks vendors can imagine. Vendors must include these costs in order to justify the unknown risks they would be accepting.
> • Competition has been reduced in recent years by unlimited liability provisions in Iowa RFP and contract language. All the firms contacted indicated they have a clear policy that they will not seek work in Iowa where unlimited liability is included in the contract, they look at RFPs on a case-by-case basis and typically recommend against submitting a proposal, or their current contracts with agencies are not DAS procurements or were negotiated prior to or in a different set of circumstances from the period where unlimited liability was required. Some vendors have contracts with other Iowa offices of elected officials or branches of government that did not apply the unlimited liability provisions. Several vendors cited specific RFPs they declined to pursue because of one or both factors – the unlimited liability provisions and lack of information about the state's risk areas. Unlimited liability, the issue of lack of state's risk information aside, is reducing the number of large IT firms competing on any given RFP to provide Iowa's technology solutions."

In its conclusions, the SPPG team observed: "Unlimited liability is negatively impacting the innovation, creativity, complexity, value, and quality of solutions offered to the state."

While the SPPG report is a welcome addition to the research coverage of state contracting, the issue of whether contractors and states can agree to risk balancing provisions such as limits of liability is something that has been debated and studied for several years. For example, in September 2004, the National Association of State Chief Information Officers (NASCIO) published an Issue Brief entitled, "Walking the Road to the Win-Win: NASCIO Procurement Subcommittee's Recommendations on Liability Limitations for State Information Technology Contracting" (http://www.nascio.org/publications/documents/NASCIO-road_to_win-win.pdf) that resulted from months of work by a team of State CIOs, State lawyers, state procurement professionals and industry representatives. The Brief reported the results of an extensive industry and state government survey and presented recommendations regarding the appropriate use of limits of liability clauses in state contracts.

Specifically, the Brief confirmed that the vast majority of companies agreed that where a state requests or insists upon unlimited liability, there is an adverse impact upon competition and higher prices result (presumably because the much greater risk assumed by contractors is reflected in proposed prices). Interestingly, over 50% of State respondents also agreed that insisting upon unlimited liability adversely impacted competition. Based on these results and the dialogue among the Committee, the Brief concluded that:

> As a general principle, the Procurement Subcommittee recommends that both states and vendors work to determine the true risks that are associated with state IT procurement contracts and then allow the states to protect themselves against those true risks, as opposed to drafting IT contracts with unlimited liability for IT vendors. This approach is intended to improve competition for state IT contracts and is expected to result in higher quality vendor products and services at a lower cost to the states.

The Committee ultimately supported limits of liability that establish reasonable caps on direct damages that are tied to the risk of the particular transaction, a disclaimer of consequential damages and a statement that vendors are not responsible for third party claims seeking indirect damages. The working proposition of the NASCIO process was that both public purchasers and IT vendors "win" through agreement on careful tailoring of limitation of liability provisions, first, because vendors are not deterred from participation by reason of unbounded exposure with no rational relationship to contract value, and second, because the states do not face paying prices that reflect the risks of such exposure. As was done through the NASCIO process, we welcome working with

Iowa to help bring the State and vendors to such a “win-win” solution for both parties and which, in our view, would comply with Iowa law.

Risk Balancing Provisions are Good Public Policy

ITAA recognizes that certain major IT projects require careful consideration of the public interest because of their high profile, expense, importance to the citizenry or risk. At the same time, we submit that the State should recognize that public companies which perform such challenging IT contracts, and prudently managed privately held companies, also operate under legal and fiduciary obligations (the “prudent business” principles) that obligate them to assess and control the economic risks of every contract regardless of the identity (or nature) of customer. Both performance and economic risks ordinarily are accomplished by securing appropriate terms and conditions in specific contracts. Limitation of liability provisions are essential to these purposes. They serve both to limit the maximum financial exposure of a private contractor, so as not to disproportionately or unreasonably expose the equity of stakeholders, and to define the exposure to certain types of damages (e.g., “direct” damages which flow from the vendor’s own actions or inactions) and to exclude other types (e.g., “indirect” damages, such as consequential or punitive damages, or damages for intangible injuries).

Especially with government customers, limitation of liability provisions are the key mechanism to strike an appropriate balance and distribute financial risk between vendors and customers such as the State of Iowa. Such provisions also support the broad public policy goal of corporate responsibility which seeks to protect the investments of not only thousands of individuals but also large institutional investors such as pension funds (including those managed for the benefit of government employees). As is widely known, the Sarbanes-Oxley legislation (Public Law No. 107-204, 116 Stat. 745) implemented the intent of Congress that publicly traded companies must disclose to their shareholders how risks assumed by the company may materially impact results and, ultimately, the value of their stock. Section 404 of Sarbanes-Oxley, in particular, requires senior corporate management not only to certify the company’s financial results but also to accept responsibility for the effectiveness of internal controls over financial reporting and to assure that internal controls prevent fraud as well as foster accurate reporting of results and business and financial risk. Companies subject to Sarbanes-Oxley (and other prudently managed companies) may find it very difficult to reconcile their reporting obligations, and other principles of prudent business operation, with acceptance of complex state government contracts without a limitation of liability.

Our analysis indicates that it is clearly in the interest of each player in state IT procurements to offer a balanced approach to distribution of financial risk. We find the case against limitation of liability to be less clear and often not well-connected to state law or procurement code. Almost without exception, state constitutions and public contracting laws do not mandate that the public purchaser completely shift all economic risks to vendors and avoid acceptance of any risk itself. The vast preponderance of public contracting law does not preclude reasonable protection of private contractors via terms and conditions to limit liability. While court decisions in a handful of states and an Attorney General's Opinion in Oklahoma have argued that a state government entity cannot include limitations of vendor liability in its contracts, there are state and case specific circumstances in these matters that do not hold application to all questions around the constitutionality of liability limitations in state contracting. Upon examination, moreover, these opinions are irrelevant or factually distinguishable because they relate, for the most part, to requests from vendors that states affirmatively pay for (that is indemnify) the vendor for its damages and attorneys fees or where the governmental entity is being asked to assume the liquidated debt of the vendor or another party. That, however, is not the case with limitation of liability provisions which seek only to strike a reasonable balance regarding the damages that a vendor would owe the state in the event of breach.

Again, vendors do not seek complete insulation from the risks and consequences of all contract breaches, malfeasance, and other failures. There are instances when a state should hold vendors responsible for direct damages arising out of their breach of a procurement contract. Vendor liability, however, should be limited according to the risk associated with the work performed under contract (and not as conceivably could be within some outer "penumbra" of associated effects). Therefore, the state should work with the vendors to determine the true risks that are associated with a contractor's work scope under a procurement contract and then allow the state to protect itself against those risks, rather than resorting to an unvarying demand that all contracts impose unlimited liability upon state vendors.

In closing, we extend our appreciation for the opportunity to review and comment on the Department's Notice of Intended Action. We would welcome the opportunity to work with you and your staff to discuss the proposed rule in greater detail. Michael Kerr, ITAA's Sr. Director for State and Local procurement issues, will be ITAA's point of contact for such discussions. Your staff can reach Michael at 703.284.5324 or via e-mail: mkerr@itaa.org.

Thank you for you time and attention to this critical issue. Industry is committed to working with you and the State to ensure that the resolution regarding limitation of liability provisions in procurement contracts is beneficial to all parties.

Sincerely,

Olga Grkavac

Olga Grkavac
ITAA Executive Vice President, Public Sector

About ITAA

With 350 direct and affiliate member companies, the Information Technology Association of America is the leading trade association serving the information technology industry.

Founded as the Association of Data Processing Service Organizations (ADAPSO) in 1961, ITAA has expanded its constituency over the years to include companies in every facet of the IT industry, including computer hardware, software, telecommunications, Internet, e-business, e-education, outsourcing, computer services and more.

The association seeks to foster an environment that is conducive to the health, prosperity and competitive nature of the information technology industry and to help its members succeed in delivering the benefits of IT to their customers. The association's industry development programs include advocacy on legislative and regulatory issues, studies and statistics, domestic and international market development and industry promotion.

The association represents the IT industry's interests in issues such as government procurement, telecommunications policy, information security, workforce development, intellectual property protection, and accounting, finance and taxation.

ITAA is the U.S. trade association member of and secretariat for the World Information Technology and Services Alliance (WITSA), an umbrella organization for over 75 global technology trade associations.

The association is the nation's leading trade association for the government IT marketplace. Over 175 leading government contractors participate in the Association's federal CIO survey, monthly dinner series, procurement policy development, white papers, planning retreats, state and local events and more.

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June 23, 2008

Patricia Lantz
Department of Administrative Services
Hoover State Office Building
1305 E. Walnut Street
Des Moines, Iowa 50319

Re: Public Comments—Contractual Limitation of Vendor Liability Provisions

Dear Patricia,

The purpose of this letter is to provide initial comments to the Department of Administrative Services regarding Limitations of Vendor Liability. Please note these comments will be supplemented with the comments provided by Wayne Hansen from Control Installation of Iowa, Inc. at a later date.

The Technology Association of Iowa (TAI) is a member-based trade association driving the success of Iowa's technology industry. Today, Iowa's information technology industry has expanded to over 3,000 companies employing over 46,000 people - and the numbers are steadily growing. Iowa's tech sector fuels broad-based economic growth, and is the foundation for the state's 21st Century economy. The Technology Association of Iowa strives to strengthen Iowa's technology ecosystem and enhance the state's reputation as a technically advanced place where world-class technology firms and organizations thrive.

Iowa's future economic vitality depends on the success of the state's technology sector. We work with business, education and political leaders statewide to make Iowa a vibrant, attractive and rewarding place for technology companies to do business, and for high-tech professionals to live and work. TAI's member companies work together to support their own enterprises while advancing Iowa's reputation as a technically advanced state. Together, our work fuels the thriving technology sector that makes Iowa a great place for world-class technology organizations.

Below you will find the TAI's written comments regarding "arc 6809b:"

1) Discretion and authority regarding the liability limitations is left solely to the state agency and department. TAI believes this will cause a freezing of the companies qualified to bid on these procurement contracts. This freezing will adversely affect the cost for the services within the contract.

2) TAI would like to see an established/uniformed approach when dealing with the limitation on liability issues. We understand the issue is complex and there is no simplistic answer or transfer of another state's solution to Iowa. Lack of information about the state's risks mean risk for the vendor, along with the cost of a solution, goes up.

3) It was my thought, and after reviewing other administrative rules, any rules promulgated by the State of Iowa should make clear the State's position on whether a certain issue or direction the State is trending is permissible under the Constitution of the State of Iowa. In order for a vendor to feel comfortable negotiating a contract with Iowa, it must know certain protections are provided.

TAI is concerned with the current draft of these rules and would like to see many of the sections reworded to provide a fair balance of liability between the State and the vendor. Thank you for your time and we look forward to working with the Department and creating a sustainable program that will showcase Iowa's procurement contract process.

Sincerely,

David Adelman

Lobbyist for the Technology Association of Iowa

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June 23, 2008

Debbie O'Leary
Patricia Lantz
Department of Administrative Services
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1305 E. Walnut Street
Des Moines, Iowa 50319

Dear Ms. O'Leary and Ms. Lantz,

We appreciate the State of Iowa's consideration of concerns expressed by the vendor community regarding vendor liability under contracts with the State. We have reviewed the Notice of Intended Action ARC6809b on Limitation of Liability (060408), and have the following comments.

The limitation of liability ("LOL") established in the first paragraph of Section 108.5(1) – two times the contract amount – is a significant improvement over unlimited liability, however, is still higher than the LOL amounts often seen in IT services contracts. In addition, the carveouts listed in this section serve to negate much of the protections otherwise afforded by a LOL provision. In particular, subsection (c) lists a broad range of requirements for which the limitation of liability provision would not apply. While many vendors might agree to exclude the confidentiality provisions from the LOL, the State has provided a far reaching list of other items to be excluded. These are not industry standard, and by excluding them from the LOL cap, place substantial risk on the vendor for unlimited liability. Also, in subsection (a), "unlawful acts" are excluded from the LOL. While that may appear innocuous, conflicts between state and federal laws relating to a State program often require guidance from the State client as to the interpretation of the laws. Following the State's guidance in those situations could be deemed to be 'unlawful' with regard to the relevant federal law, thereby removing the protection of the LOL.

We also have concerns about Section 108.5(2). This section services to limit the *type* of damages to which vendor may be subjected (versus Section 108.5(1) where the *amount* of the damages is limited). We do not agree that the same exclusions apply to this section as to the LOL cap above. Every project has some degree of inherent risk; whether the project is performed by vendor or by the State itself, there is the risk of certain things going wrong, or unforeseen impact. While most vendors are willing to take some degree of responsibility in those circumstances, they cannot agree to indemnify against any possible damage incidental to the services being performed. The purpose of a services agreement is for the vendor to perform a service, not to take on full risk for State projects; we cannot serve as the State's insurance company. Therefore, the protection we offer is liability up to a certain amount, sufficient to replace the services or complete the work.

The proposed rules also do not take into consideration low risk contracts where the LOL should be reduced. The amounts the State is proposing appear to be the minimums that would be required in every contract. We believe there should be some flexibility allowed in the amounts and types of liability, but upwards and downwards.

Because of these concerns, we respectfully request the following changes to the proposed administrative code:

108.4(2) Special circumstances. Certain information technology procurements of information technology devices and services expose the state to risks for which the contractual limitation of vendor liability outlined in rule 108.5(8A) is not appropriate. The department or applicable agency for which the department is conducting the procurement shall review the risks presented by the particular information technology procurement before initiating the procurement. When either the department or the applicable agency believes a particular information technology procurement may expose the state to risks for which the contractual limitation of vendor liability outlined in rule 108.5(8A) is not appropriate, the department or applicable agency shall identify the risks and identify the steps the department or applicable agency believes may help to mitigate the risks. The director or the applicable agency head shall consult with the department of management to determine whether a lower or higher limit of the vendor's contractual liability is appropriate. This determination shall occur before the department issues the competitive selection documents, and the competitive selection documents issued in the procurement shall include the lower or higher limitation on the vendor's contractual liability that the director or the applicable agency head and the department of management have determined to be appropriate for the procurement under consideration.

108.5(1) For information technology procurements, the director authorizes the competitive selection documents and the resulting contract to include a contractual limitation of vendor liability clause that limits the vendor's liability to the contract value, as defined in subrule 108.5(3), provided that the foregoing limitation shall not apply to:

a. Intentional torts, criminal acts, fraudulent conduct, intentional or willful misconduct, or bad faith.

b. Claims related to death, personal injury, or damage to real or personal property due to vendor's negligent acts or omissions in performance of the Contract.

c. Material breach of any contractual obligations of the vendor pertaining to infringement indemnification, confidential information.

d. Claims arising under provisions of the contract calling for indemnification of the state for third–party claims against the state for bodily injury to persons or for damage to real or tangible personal property caused by the vendor's negligence or willful conduct.

108.5(2) For information technology procurements, the director authorizes the competitive selection documents and the resulting contract to include a contractual limitation of vendor liability clause that limits the vendor's liability for consequential, incidental, indirect, special, or punitive damages, except to the extent the vendor's liability for such damages is specifically set forth in the statement of work, scope of services, or technical requirements.

Thank you for your consideration of these comments and proposed changes. If you have any questions, feel free to contact me directly at 651-246-5075 or email me at scott.malm@bearingpoint.com.

Sincerely yours,

Scott Malm
Managing Director